(3)

No. 88-274

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

DAVID O. WILSON,
Petitioner,

VS.

ANNA M. HARELSON, et al.,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Ninth Circuit err in concluding that a sales agent who was the only contact with the investors, who described the investment, who represented that the investment was safe and highly profitable, who helped the investors fill out the necessary paperwork, who accepted the investors' checks, and who received a commission from the sale of the unregistered security "solicited" the investment within the meaning of *Pinter v. Dahl*, ____ U.S. ____, 108 S.Ct. 2063 (June 15, 1988).

LIST OF PARTIES PURSUANT TO RULE 28.1

The parties to the proceedings below were the petitioner David O. Wilson and the respondents Anna M. Harelson, Anna M. Harelson, Ph.D., Inc., Defined Benefit Plan, Louis Rigali and Julianne Rigali.

The petitioner before this Court is David O. Wilson, an individual. Respondents are unaware of any parent companies, subsidiaries, or affiliates to the petitioner.

The respondents before this Court are Anna M. Harelson, Anna M. Harelson, Ph.D., Inc., Defined Benefit Plan, Louis Rigali and Julianne Rigali. Except for those listed above, respondents do not have any other parent companies, subsidiaries, or affiliates.

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STATEMENT OF THE CASE

Petitioner David O. Wilson (hereinafter referred to as Wilson) consciously chose not to provide the United States Court of Appeals with a reporter's transcript of the proceedings in the District Court. As a result, the "facts" that can be relied upon by Wilson to reverse the findings of the Court of Appeals are limited to the facts found in the opinions of the District Court and the United States Court of Appeals for the Ninth Circuit.

In the words of these two courts the relevant facts are as follows:

Wilson was an agent for the Miller Financial Corporation, which was, in turn, the sales agent for the Carter Company. Wilson received a commission for obtaining investors in the factoring program. (Memorandum of Opinion 9:14-17.)

He [Wilson] met with both the Rigalis on June 22, 1983 after having met with Mr. Rigali previously in response to a call from Mr. Rigali, who had heard about the Carter Company's medical

factoring program from Wilson's brother. Wilson met with Harelson on July 1, 1983 after setting up an appointment in response to her call. (Memorandum of Opinion 9:17-22.)

During the Summer of 1983, Wilson met separately with Harelson and the Rigalis and made a presentation to them about investing in a medical factoring program operated by the Carter Company. Using the brochure produced by the Carter Company, Wilson explained that the Carter Company factored medical claims by purchasing, at a discount, the right of doctors to collect on accounts receivable from insurance companies. He represented that the doctors remained liable to the Carter Company for the claims and that the Carter Company only dealt in claims that involved doctors and insurance companies that it felt were responsible. Wilson also described the investment. He explained that the investor would receive a return of 7% every 90 days on the amount invested. However, he also indicated that the rate of return could vary from an annual rate of 20% up to an annual rate of 30% or 33% depending on how successful the Carter Company was at collecting on the claims. There was no negotiation of the rate of return between Wilson and the respondents. Wilson also represented that in the seven year history of the Carter Company, it had never failed to pay an investor and that he had invested in the Carter Company and had benefited. He further represented that he had met Mr. Carter, who was a man of substantial means, and that he, Wilson, had visited the Carter Company. (Memorandum of Opinion 2:15-18; 9:25-10:12; 10:20-25.)

At the conclusion of both the June 22, 1983 meeting with the Rigalis and the July 1, 1983 meeting with Harelson, Wilson helped the respondents complete the forms and he [Wilson] accepted the checks that were forwarded to the Carter Company. At the conclusion of those meetings, Harelson invested $34,500.00 on behalf of her corporation's defined benefit plan and the Rigalis invested $13,000.00. (Memorandum of Opinion 10:26-11:1; 2:18-22.)

Wilson was a "substantial factor" in the sale of the interest in the medical factoring program to Harelson and the Rigalis. Wilson was not merely a conduit providing routine services. Wilson engaged in a high degree of individual effort to sell the

security and was the only actual contact with the plaintiffs. (Memorandum of Opinion 11:2-11.)

OBJECTION TO STATEMENT OF THE CASE BY PETITIONER WILSON

Respondents Harelson and the Rigalis (hereinafter referred to as respondents), object to certain material portions of the statement of facts presented by Wilson because they are unsupported by the record in this case. Wilson states that he neither solicited investors nor acted as a broker, dealer, underwriter, or investment advisor in connection with the sale of the Carter Company notes. (Petition of Writ 6:17-7:4.) The only reference to the record for this statement is a citation to the Memorandum of Opinion at page 18, lines 8-11, Appendix III at A-47, which states that there was no evidence that Wilson was a broker or made a recommendation. There is, therefore, no factual support in the record for Wilson's contention that he did not solicit investors. This "factual" contention is relied on by Wilson extensively in his legal argument.

Wilson states that, in connection with the respondents' purchases of Carter Company promissory notes, Wilson played a very limited role. (Petition for Writ 7:10-12.) No reference to the record is given for this statement and it is directly contrary to the United States Court of Appeals' analysis that Wilson was "scarcely distinguishable from the archetypal American salesman, Willie Loman." On the facts found by the District Court, Wilson was a seller within the meaning of § 12(1) of the Securities Act of 1933, 15 U.S.C. § 771(1). Wilson adds that at no time did he [Petitioner] recommend the investment. (Petition for Writ 9:1-2.) The reference given in support is the Memorandum of Opinion at page 18, lines 8-11, and 25-28, page 19, line 1, Appendix III at A-48. Wilson's reliance for support on statements by the District Court that there was no evidence that Wilson was a broker, made investment recommendations, or gave financial advice to respondents are not well founded. These statements were made by the District Court with respect to allegations against Wilson of fraud and breach of duty and do not appear to have been intended to have any bearing or effect on Wilson's

liability for violation of § 12(1) of the Securities Act. Wilson's assertion that he did not recommend the investment is directly contrary to the District Court's finding that Wilson was not merely a conduit providing routine services and that he engaged in a high degree of individual effort to sell the securities and was in actual contact with the plaintiffs.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. There Is No Conflict Between The Recent Decision Of This Court In *Pinter v. Dahl* And The Lower Courts' Decisions In This Case

The questions presented in the case of *Pinter v. Dahl*, ____ U.S. ____, 108 S.Ct. 2063 (June 15, 1988), are: (a) whether the in pari delicto defense is available under § 12(1) and; (b) whether one must intend to confer a benefit on himself in order to qualify as a "seller" within the meaning of § 12(1). The issues presented and the opinion rendered in *Pinter, supra*, do not conflict with the decision by the Court of Appeals for the Ninth Circuit in the matter now before this Court on a Petition for Writ of Certiorari. In the case at bench, there are no facts to raise the issue of in pari delicto defense and no dispute that Wilson was both motivated to sell the securities by the fact that he was to receive a commission and did, in fact, receive a commission. (Memorandum of Opinion, 9:12-17.)

Although the court in *Pinter v. Dahl, supra*, sets forth a new standard in imposing liability on one who is a "seller" under § 12(1), this does not conflict in any way with the decision of the Court of Appeals for the Ninth Circuit in this case. In fact, the Court of Appeals' Order and Amended Opinion states:

> His [Wilson's] participation was far more than de minimis. He solicited the sale. He was a seller. *Pinter v. Dahl*, ____ U.S ____, No. 86-805, June 15, 1988.

This amendment to the original opinion clarifies any misconception which Wilson may have had that the Court of Appeals failed to apply the test set forth in *Pinter v. Dahl, supra*, in

formulating its opinion that Wilson solicited the sale of securities and therefore was liable to respondents as a seller within the meaning of § 12(1).

II. Wilson Solicited The Sales To Respondents And Was A Seller Within The Meaning Of § 12(1)

In *Pinter, supra*, at page 2070, the court reasoned as follows:

> That a rule imposing liability (without fault or knowledge) on friends and family members who give one another gratuitous advice on investment matters unreasonably interferes with well-established patterns of social discourse. Accordingly, since the court found no evidence that Dahl sought or received any financial benefit in return for his advice, it declined to impose liability on Dahl for mere gregariousness.

In this case, Wilson was not a friend or family member to the respondents and he did receive a monetary benefit in the form of a commission as a result of his efforts. Therefore, the reasoning in *Pinter* that found that Dahl was not a seller under § 12(1) would not apply to Wilson since the facts of this case are diametrically different.

In *Pinter*, the court at page 2077 stated as follows:

> The requirement, however, does not exclude solicitation from the category of activities that may render a person liable when a sale has taken place. A natural reading of the statutory language would include in the statutory seller status at least some persons who urged the buyer to purchase. For example, a securities vendor's agent who solicited the purchase would commonly be said, and would be thought by the buyer, to be among those 'from' whom the buyer 'purchased,' even though the agent himself did not pass title.

Wilson, as the agent for the agent for the seller, was the *only* person who had any contact with the respondents in regard to the sale and as such certainly falls within the natural reading of the statutory language of § 12(1).

Wilson argues in his Petition for Writ of Certiorari that his limited activities do not support a finding of "seller" liability

under § 12(1). However, Wilson's only support for this argument is the fact that the District Court stated in its Memorandum of Opinion that Wilson did not "recommend" the purchase. This statement was made by the District Court in the context of its discussion regarding Wilson's liability for fraud and makes absolutely no reference to the § 12(1) liability. Taken out of context as it was, it would be an error for this Court to infer that the District Court intended that its statement have some bearing or effect on Wilson's liability for violation of Securities Act § 12(1). More compelling are the following findings of the District Court:[1]

> (1) Wilson was an agent for the Miller Financial Corporation, the sales agent for the Carter Company;
>
> (2) Wilson received a commission for obtaining investors in the factoring program;
>
> (3) Wilson was the only representative to meet with the plaintiffs;
>
> (4) Wilson provided the documentation explaining the investment to the plaintiffs;
>
> (5) Wilson explained and described the investment to the plaintiffs;
>
> (6) Wilson represented that the Carter Company had a seven year history and that Mr. Carter was a man of substantial means; and
>
> (7) Wilson helped the plaintiffs complete the forms and he accepted the checks that were forwarded to the Carter Company. (Memorandum of Opinion 9:12-11:1.)

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[1] The Memorandum of Opinion does not purport to be a complete recitation of all of the facts of the case and therefore cannot be taken as the complete sum and substance of all of Wilson's actions in the sale of the unregistered securities. As a result, it is impossible for Wilson to establish that the findings of the District Court are clearly erroneous when there is no record of the evidence that was before the District Court.

The District Court further found as follows:

> Finding the facts to be as stated, the court is compelled to further find that Wilson was a substantial factor in the sale of the interest in the medical factoring program to Harelson and the Rigalis.
>
> Although defendants have urged the court to conclude that Wilson was merely a conduit providing routine services, and, therefore, could not be liable as a seller, the court disagrees. Where, as here, 'the defendant engaged in a high degree of individual effort to sell the security and . . . has been in actual contact with the plaintiff(s).' *In re Fortune Systems Litigation*, 604 F.Supp. 150, 161 (N.D. Ca 1984), the court cannot conclude that the law precludes the imposition of seller liability. (Memorandum of Opinion 11:6-14.)

It taxes one's imagination to believe that Wilson could have taken all of these steps and yet find that he did not "solicit" the sale solely because he did not recommend it.

In support of his contention that his actions did not amount to solicitation, Wilson refers the Court to Black's Law Dictionary 1248-49 (5th ed. 1979). However, the definition contained there is as follows:

> Solicit. To appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading . . .

Wilson clearly appealed for something, asked earnestly, asked for the purpose of receiving, and endeavored to obtain by asking. Although the definition of solicit implies a serious request, it requires no particular degree of importunity, entreaty, imploration, or supplication as suggested by Wilson. See, for example, *People v. Phillips*, 70 Cal.App.2d 449, 160 P.2d 872, 874. Using Wilson's own suggested reference source, as set forth above, there can be little doubt that the acts of Wilson, as found by the District Court, satisfy the burden of proof that Wilson was a seller within the meaning of § 12(1). Any question as to whether the acts which the District Court found Wilson to have committed rise to

the level of "solicitation", are answered by the Court of Appeals' decision that "He [Wilson] solicited the sale. He was a seller."

Respondents therefore submit that the findings of the District Court and the decision of the Ninth Circuit support the conclusion that Wilson's activities rise to a "solicitation" and therefore Wilson is a seller within the meaning of § 12(1) of the Securities Act.

CONCLUSION

The opinion of the Court of Appeals for the Ninth Circuit, as amended, is entirely consistent with this Court's opinion in *Pinter v. Dahl*. Moreover, the holding that Wilson was a "seller" within the meaning of § 12(1) is also entirely consistent with *Pinter v. Dahl*. This Court should therefore deny Wilson's petition for a Writ of Certiorari.

DATED: September 22, 1988

Respectfully submitted,

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